RECENT IMPORTANT DECISIONS.

ATTACHMENT—POWER OF NOTARY PUBLIC TO TAKE AFFIDAVIT WHERE HE IS AN ATTORNEY FOR ONE OF THE PARTIES.—§ 5271 Ohio Rev. St. provides that the officer before whom depositions are taken must not be a relative or an attorney of either party or otherwise interested in the event of the action or proceeding. § 5107 Ohio Rev. St. provides that the affidavit verifying the pleading may be made before any person authorized to administer oaths, whether an attorney or not. Plaintiff filed an affidavit for attachment process, sworn to before a notary public who was also the attorney for the plaintiff. Defendant filed a motion to discharge the attachment and plaintiff applied for leave to amend. *Held,* the affidavit was fatally defective, and leave to amend was refused. *Leavitt & Milroy Co.* v. *Rosenberg Bros. & Co.* (1911), — Ohio —, 93 N. E. 904.

The theory of the case is, that because of the important purposes for which an affidavit may be used, the officer before whom it is made should be as disinterested as in the case of taking a deposition. This view is supported by the English decisions, which hold that affidavits taken before attorneys interested in the case cannot be read in evidence. *King* v. *Wallace,* 3 Term Rep. 403; *Hopkinson* v. *Buckley,* 8 Taunt. 74. Some of the old American cases hold contra, *Dawes* v. *Glasgow,* 1 Burn. (Wis.) 8; holding that although it is an obvious impropriety for an attorney in a cause to take the affidavit of his client, yet there is no provision of law or rule of court prohibiting the same. An attorney who is also a notary public may take the affidavit of his client verifying the complaint. *Kuhland* v. *Sedgwick,* 17 Cal. 123; *Reaves* v. *Cowell,* 56 Cal. 588. A notary who is an attorney of record in the cause is authorized under the statute to take an affidavit of the service of a summons. *Young* v. *Young,* 18 Minn. 90. The earlier New York cases follow the English practice. *Taylor* v. *Hatch,* 12 Johns 340; but the rule which excludes an attorney as notary from taking the affidavit of his client for the purpose of procuring an attachment is merely technical and has never been extended beyond the case of the attorney of record. *People* v. *Spalding,* 2 Paige 326; *Willard* v. *Judd,* 15 Johns. 531; *Post* v. *Coleman,* 9 How. Pr. 64, Thus the rule does not extend to the partner of the attorney of record, *Hollenback* v. *Whitaker,* 17 Johns. 2; nor to an affidavit for a certiorari taken before the attorney who commences the suit, *Vary* v. *Godfrey,* 6 Cow. 587. Contrary to the principal case the later New York decisions hold that the rule being merely technical, the other party should at once move to set aside the proceedings for irregularity, or the objection will be waived, as the affidavit on which the attachment issues is not a nullity, even though taken before one of the attorneys of record as notary. *Gillmore* v. *Hempstead,* 4 How. Pr. 153; *Baumeister* v. *Demuth,* 84 App. Div. 394, *Vreeland* v. *Penn. Tanning Co.,* 130 App. Div. 405. Illinois and Nebraska also hold that the affidavit is not a nullity. *Link* v. *City of Litchfield,* 141 Ill. 469; and, contrary to the principal case, allow its defects to be cured by amendment.

Horkey v. *Kendall,* 53 Neb. 522, 73 N. W. 953; *Dobrey* v. *Western Mfg. Co.,* 57 Neb. 228, 77 N. W. 656, but this seems to be overruled by *Malcolm Savings Bank* v. *Cronin,* 80 Neb. 228, 114 N. W. 158, holding that such affidavit cannot be used in support of an attachment issued therein against the objections of the defendant. However, in support of the principal case that the affidavit taken before one of the counsel in the case cannot be received in evidence, see *Den* v. *Geiger,* 9 N. J. L. 281, and that it is unauthorized if taken before the attorney of record, *Tootle* v. *Smith,* 34 Kan. 27, 7 Pac. 577; *Wilkowski* v. *Halle,* 37 Ga. 678, 95 Am. Dec. 374, the court saying that, "Both upon principle and authority the attorney who may be a notary public is not authorized to take the affidavit and bond of his client and issue the attachment in a case where he is employed."

BANKRUPTCY—EFFECT OF DISCHARGE—RES ADJUDICATA.—In April, 1900, Youngman recovered a judgment on a debt owed him by Salvage. In January, 1902, Salvage filed a petition in bankruptcy. The judgment obtained by Youngman was included in the schedule of liabilities. Discharge in bankruptcy was refused. In May, 1906, Salvage filed a second petition, and was granted a discharge, the judgment being included. Later Youngman got execution on the judgment. On application of Salvage the state court made an order that the discharge in bankruptcy discharged Salvage from liability on the judgment. *Held,* on appeal, that the second proceedings and discharge barred the judgment. *Youngman* v. *Salvage* (1911), — N. D. —, 130 N. W. 930.

When the debts are identical the second petition is not maintainable after refusal of the first, the denial being res adjudicata, and the question of whether or not a bankrupt is entitled to be discharged from the debts scheduled is settled. *Kuntz* v. *Young,* 131 Fed. 719, 12 Am. B. R. 505. The court in *re Fiegenbaum,* 121 Fed. 69, 7 Am. B. R. 339, said, "Where the discharge is refused on the merits the judgment enures to the benefit of all the creditors. Both parties are bound by it, and neither party should be permitted to try the same question again. It is res adjudicata." Though this principle is apparently well settled, some difficulty has arisen in case part of the debts scheduled are the same and part different. Undoubtedly where all of the debts scheduled are new a former discharge or refusal has no effect on a succeeding discharge, and conversely where all the debts are the same the former discharge or refusal is final between the parties. Because the bankrupt has a right to apply for a discharge from new debts does it follow that he should have the right to throw the burden of new litigation upon the old creditors? Probably considerable of the difficulty lies in failing to determine just how far the first discharge or refusal is res adjudicata. The issue of a right to a discharge is res adjudicata as to a subsequent proceeding. *In re Kuffler,* 151 Fed. 12, 18 Am. B. R. 16. Right to a discharge is to be distinguished from the dischargeability of a particular debt. REMINGTON, BANKRUPTCY, § 2438. The dischargeability of the particular debt may not have been litigated. The discharge or refusal may have been res adjudicata merely as to an intentional failure to keep books of account, and so no adjudication as to the particular